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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS, *Petitioner*,

v.

EUGENE M. ZUCKERT, Secretary of the Air Force, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

DAVID I. SHAPIRO
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Attorney for Petitioner

SIDNEY DICKSTEIN,
Of Counsel

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PETITION FOR REHEARING

After the close of oral argument of this cause, the Solicitor General advised the Court by letter, *inter alia*,:

> "3. The Air Force raised no impediments in the present case. Petitioner did not attempt to communicate with the witnesses or request the Air Force to produce them prior to the hearing.
>
> "4. The Air Force regulations and statements of policy give me every reason to believe it would have required the three men in question to appear if the petitioner had requested it to do so."

This Court concluded, in the absence of clear contradiction in the record, that:

> "Although amply notified in advance of the nature of the charges, the names of the witnesses whose affidavits had supplied the factual basis for his dismissal, and the date of the hearing, neither petitioner nor his counsel made any request, prior to the hearing, of the Air Force, of the Commission or its examiners, or of the witnesses themselves, for their appearance for cross-examination. The request for production of the witnesses, made only at the hearing by petitioner's counsel, was neither timely nor in conformity with the applicable regulations, which contemplate that the party desiring the presence of witnesses, either for direct or cross-examination, shall assume the initial burden of producing them."

Information brought to the attention of petitioner's counsel after the Court handed down its opinion, clearly shows that the post-argument representations of the Solicitor General were in error.

On April 28, 1959, seven days before the date of the hearing, petitioner gave an affidavit to Robert M. Sefranka, Investigator, U. S. Civil Service Commission. Petitioner's counsel has been advised by Stephen Pollak, Esq., of the Solicitor General's office that the file jacket of the Civil Service Commission contains the original of that affidavit, a copy of which is annexed as Exhibit A. In that affidavit, petitioner stated:

> "I further request that the good faith of the employing agency be demonstrated by presenting SSGt Alton Tyler at the hearing before the Hearings (sic) Examiner for cross-examination on May 5, 1959 at 9:00 A.M. since the said Tyler is under the jurisdiction of the employing agency and subject to its commands as a military person,

> which power to require his attendance (sic) is not available to me by subpoena or available to the Commission.
>
> * * *
>
> "It is further requested that A 2C Patrick J. Ryan and A 2C Curtis L. Stevens also be present at the hearing scheduled May 5, 1959 at 9:00 A.M. on the same grounds as herein asserted for the presence of SSgt Alton Tyler."

The foregoing information was communicated to the Office of the Solicitor General who advised by letter dated January 29, 1963:

> "There is no inconsistency between the affidavit and the fourth point set forth in my letter of December 13, 1962. The only request for the appearance of witnesses was in the affidavit which was filed with an investigator of the Civil Service Commission. It does not appear that prior to the hearing Mr. Williams ever made any request direct to the Air Force."

On January 31, 1963, petitioner's counsel telephoned Mr. Sefranka, the Commission Investigator who subscribed the affidavit of April 28, 1959. Mr. Sefranka is still employed in that capacity and assigned to the Commission's office in Albuquerque, New Mexico. Mr. Sefranka stated that he had had no contact with the matter for a period of approximately five years, but did recall making the investigation. He further stated that it was standard operating procedure to show such affidavits to the employing agency *prior* to the hearing in order to elicit any further comment the agency might desire to make. He added that this was the specific reason for the standard language at the end of such statements, *i.e.*, "The information given is not to be considered confidential."

Neither petitioner nor his counsel could reasonably anticipate that the timeliness of the demand would be material to a resolution of this cause. Inasmuch as the district court dismissed the complaint on respondents' motion for summary judgment without inquiry into those facts which this Court's opinion makes material, and the court below affirmed (R. 100) relying upon its prior, and now erroneous, decision in *Devine* v. *Campbell*, 194 F. 2d 876, certiorari denied, 344 U.S. 826, petitioner should be accorded an opportunity to demonstrate that he "[brought] himself within" the regulations as construed by this Court.

CONCLUSION

By reason of the foregoing, the petition for rehearing should be granted, the judgment below should be reversed and the case remanded for a full hearing consistent with the opinion of this Court.

Respectfully submitted,

DAVID I. SHAPIRO
1411 K Street, N. W.
Washington 5, D. C.

Attorney for Petitioner

SIDNEY DICKSTEIN,
Of Counsel

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

DAVID I. SHAPIRO

EXHIBIT A

AFFIDAVIT

State of Colorado
City and County of Denver } ss

I, Daniel Alton Williams, residing at 1830 E. 39th. Avenue, Denver, Colorado, being duly sworn, make this statement of my own free will, without promises or assurances:

That in addition to my affidavit dated April 23, 1959, this affidavit is hereby submitted as a supplement thereto, and that I do hereby object and except to any consideration by the Commission of that portion of the letter of charges dated 11 March 1959, and specifically to the alleged offenses dated 30 March 1957 and 10 May 1958 in that the said charges relate to alleged offenses that allegedly occurred prior to the date of my certification and employment as a civilian employee of the United States Air Force Academy, which date of employment was 13 October 1958, and on the further grounds that the aforesaid charges were while I was in the United States Air Force fully investigated by the Office of Special Investigation. That pursuant to said investigation the evidence was found to be insufficient to warrant a courts martial and subsequent thereto I was honorably discharged from the United States Air Force. That the foregoing allegations were fully known to the employing agency and more specifically by my immediate superiors, i.e. Captain Robert E. Reenz and Colonel Evan F. Bourne and the Chief of Staff of the Air Force Academy. That in reference to the allegations in relation to and made by SSGT Alton Tyler the affidavit submitted by him is totally irrelevant and prejudicial in that the alleged report made by said affiant was hearsay to me, contains numerous contradictions of fact and does not relate to misconduct while a civilian employee. I further request that the good faith of the employing agency be demonstrated by presenting SSGT Alton Tyler at the hearing before the Hearings Examiner for cross-examination on May 5, 1959 at 9:00

A.M. since the said Tyler is under the jurisdiction of the employing agency and subject to its commands as a military person, which power to require his attendant is not available to me by subpoena or available to the commission.

That in reference to the allegation of wilful damage to a Government typewriter no evidence has been submitted to me by affidavit or otherwise as to the fact of damage and said allegation should be dismissed and not considered for any purpose by the Commission since there was apparently no such proof available to the employing agency when it reached a determination of damage in the absence of proof and the said agency should now be precluded from attempting to buttress a decision which in the first instance was without proof now being permitted to provide the absent evidence.

It is further requested that A/2c Patrick J. Ryan and A/2c Curtis L. Stevens also be present at the hearing scheduled May 5, 1959 at 9:00 A.M. on the same grounds as herein asserted for the presence of SSGT Alton Tyler.

That it is my desire and request that I be permitted to offer such additional or new evidence that may become available to me prior to the date of the hearing at the hearing of May 5, 1959.

It is further alleged that during the course of my employment I was denied the simple courtesies from my supervisor, Mrs. Jeanne W. DeSmet, who refused to occupy the same office with me, who informed me that my effectiveness in the Colorado Springs area was adversely affected by reason of my race and color. That resentment was manifested by her to the fact that I was even employed in the position from which I have been removed.

I do hereby incorporate by reference the following affidavits and request that the same be made a part of the record on appeal, to-wit:

Affidavit of Joseph G. DeSantis, dated 12 March 1959.
" " Mildred L. Culleton
" " Cadet James R. Blackwell

and a carbon copy of a letter addressed to Captain Renz and Rutledge, dated 24 October 1958.

I do hereby designate Irving P. Andrews, Esq. of Denver, Colorado, as my attorney for the hearing of May 5, 1959, before the hearings examiner.

I have read the above statement consisting of 2 pages, which is true and complete to the best of my knowledge and belief. I further understand that the information I have given is not to be considered confidential and that it may be shown and discussed to the *interested* parties.

DANIEL ALTON WILLIAMS
Daniel Alton Williams

Subscribed and sworn to before me at Denver, Colorado, this 28th day of April, 1959.

ROBERT M. SEFRANKA, *Investigator*
U.S. Civil Service Commission.